



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100215/2021 (V)

Held by Cloud Video Platform (CVP) on 9 November 2021

Employment Judge M Sangster

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Mr B Hewitson

**Claimant
In person**

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Pollock Scotrans Limited

**Respondent
Represented by
Mr Sutherland
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the claimant was a disabled person, for the purposes of section 6(1) of the Equality Act 2010, and the respondent had constructive knowledge of this, at the relevant time

REASONS

Introduction

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1. This was a preliminary hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

E.T. Z4 (WR)

2. The preliminary hearing was to determine whether the claimant was a disabled person, for the purposes of section 6 of the Equality Act 2010 (**EqA**), at the relevant time and whether the respondent knew or ought to have known of this. The relevant time was December 2020, when his employment terminated. The claimant states that he is a disabled person by reason of anxiety.
3. The claimant gave evidence at the preliminary hearing. A joint bundle of documents was lodged in advance of the preliminary hearing, extending to 59 pages.

Findings in fact

4. The Tribunal found the following facts, relevant issues to be determined, to be admitted or proven.
5. In around 2010, the claimant was experiencing difficulties in both his work and personal life. He consulted his GP about the symptoms he was experiencing and was diagnosed with anxiety. He had several lengthy periods of absence from work as a result of anxiety and was later prescribed propranolol. That medication did not however prove to be suitable for him
6. By April 2014, the claimant's mood was very low. He lacked motivation and was increasingly irritable. He was unable to face work and was certified as unfit to work by his GP. He was unable to socialise or spend time with his children. He had difficulty sleeping and he could not get out of bed in the morning. He developed a stutter as a result of his anxiety. He was prescribed fluoxetine at that time.
7. While the difficulties the claimant was experiencing in his personal life improved, his medical condition did not. The claimant remains on fluoxetine and has taken a high dose of fluoxetine continuously since 2014, of between 40mg and 60mg daily. His dosage has been increased from 40mg to 60mg whenever he feels his symptoms increase, notwithstanding the medication. He has required to increase to 60mg of fluoxetine on numerous occasions since 2014. He has been unable to reduce the dose below 40mg without becoming extremely agitated and more anxious. This was confirmed in a medical report

from the claimant's GP dated 24 January 2020. She stated that, as a result of the unsuccessful attempts to decrease the dosage of fluoxetine, the claimant *'will undoubtedly be prescribed this medication life-long'*. A further medical report, dated 31 March 2021, confirmed that the claimant remained on 60mg of fluoxetine daily. While the claimant stated in his evidence that the maximum dose of fluoxetine he was prescribed was 50mg, the Tribunal did not accept this to be the case, given the repeated reference to a dosage of 60mg within both the medical reports and medical records the Tribunal were referred to.

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8. By the start of 2020, the claimant's anxiety was relatively well managed by medication. In a report dated 24 January 2020, the claimant's GP stated that *'the signs of his anxiety would not necessarily be obvious to an employer, whilst things were stable at work'*.

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9. The claimant commenced employment with the respondent on 19 October 2020. On his first day of employment the claimant completed a formal application form and handed it to his line manager. The application form contained a section entitled 'Health Details'. When completing that section, the claimant ticked boxes to indicate the following:

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(i) That he did not have a physical or mental impairment which had a substantial and adverse effect on his ability to carry out day to day activities;

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(ii) That there were no special arrangements for work or interview associated with any such impairment; and

(iii) That he was currently taking and/or regularly receiving medication. He handwrote on the form that the medication was fluoxetine.

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10. On that day the claimant also completed a form entitled 'Health Assessment'. He also handed that to his line manager. That form stated that *'During the course of your duties you may be required to work at night. Accordingly, the company can offer a free Health Assessment, which consists of questionnaire and if required a medical examination. Please complete the attached slip signifying whether or not you wish to proceed with an assessment and return*

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it to me at the Bathgate Office.’ The claimant completed the form to signify ‘*I do require a free Health Assessment*’.

11. On 20 October 2020, the claimant completed a health questionnaire provided to him by the respondent and handed the completed questionnaire to his line manager. In this he was asked if he had ever had ‘*depression, mental illness or nervous debility.*’ He responded ‘yes’ and in the small box where he was asked to handwrite ‘*full details in the space provided of the dates, duration and outcome of the illness or condition*’, he stated ‘*Anxiety – Fluoxetine*’. The form provided by the respondent stated ‘*if we have any concerns about your illness for work, employment will be subject to satisfactory medical reports.*’ The respondent did not make further enquiries of the claimant in relation to his medical condition or the medication he was taking. They did not seek a medical report or refer him to a medical practitioner for assessment.

12. On/around 12 November 2020 the respondent asked the claimant to fill in the form entitled ‘Health Assessment’ again. He did so, again signifying that he required a free health assessment. At the bottom of the form he also handwrote, ‘*I have a mental health disability that prevents me doing nightshifts. If asked to do night shift a doctor can confirm.*’ The claimant handed this to his line manager. The respondent made no further enquiries of the claimant in response to this.

Submissions

Respondent’s submission

13. The respondent’s submission, in summary, was that:
- (i) the claimant had failed to demonstrate each of the four elements of the test set out in ***Goodwin v Patent Office*** [1999] IRLR 4;
 - (ii) The medicalisation of employment issues does not amount to a disability; and
 - (iii) The respondent did not know and could not reasonably have been expected to know that the claimant was a disabled person. The

information provided by the claimant was not sufficient to put the respondent on notice.

14. The cases of ***J v DLA Piper UK LLP*** [2010] IRLR 936, ***Morgan v Staffordshire University*** [2002] IRLR 190 and ***Seccombe v Reed in Partnership Limited*** UKEAT/0213/20/OO were referred to.

Claimant's submission

15. The claimant, in summary, submitted that his doctor had confirmed that he suffered from anxiety and that the condition was long term. He took medication to manage the impact on his day-to-day activities, which would otherwise be significant.

16. The respondent ought to have known he was a disabled person, given the information he provided. It is not reasonable for the respondent to ask for medical information and then to simply file this and not ask further questions to find out more.

Relevant law

Disability Status

17. Section 6(1) EqA provides:

'A person (P) has a disability if —

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

18. Schedule 1 EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

'2(1) The effect of an impairment is long-term if-

(a) it has lasted at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.'

19. Paragraph 5 states

5 *'5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –*

(a) measures are being taken to treat or correct it; and

(b) but for that, it would be likely to have that effect.'

10 20. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the **Guidance**) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

15 21. The Guidance at paragraph A8 states *'It is not necessary to consider how an impairment is caused... What is important to consider is the effect of an impairment, not its cause.'*

20 22. The Guidance at paragraph B1 deals with the meaning of 'substantial adverse effect' and provides:

25 *'The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.'*

30 23. Paragraphs B4 and B5 provide that:

'An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect.

For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would

amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.'

24. Paragraph B1 should be read in conjunction with Section D of the Guidance 15, which considers what is meant by '*normal day-to-day activities*'.

5 25. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

26. Paragraph D3 Provides that:

10 *'In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.'*

15 27. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

20 28. The Equality and Human Rights Commission: Code of Practice on Employment (2011) (the **Code**) at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that

'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.'

29. At paragraph 16 it states:

25 *'Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the*

substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).'

30. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

- a. Does the person have a physical or mental impairment?
- b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- 10 c. Is that effect substantial?
- d. Is that effect long-term?

31. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

15 *Knowledge of disability*

32. The approach to be adopted in considering whether an employer knew, or could reasonably have been expected to have known, that an individual was a disabled person is informed by the Code, which states at paragraphs 5.14 & 5.15 as follows:

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'It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

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An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy

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and ensure that personal information is dealt with confidentially.'

Discussion & Decision

Disability Status

- 5 33. The Tribunal firstly considered whether the claimant had demonstrated a mental impairment. The Tribunal accepted that, from 2010 until the termination of his employment with the respondent, the claimant had anxiety (at times severe anxiety) which constituted a mental impairment.
- 10 34. The Tribunal then considered whether the impairment had an adverse effect on the claimant's ability to carry out normal day-to-day activities and, if so, whether that adverse effect was substantial. The Tribunal was mindful that, in considering that question, any medical or other treatment should be discounted, and the impairment should be taken to have the effect it would have had without such treatment. In this case, that meant that the prescription medication taken by the claimant, namely fluoxetine (and previously propranolol) should be discounted. The Tribunal noted that, prior to commencing fluoxetine, the claimant's anxiety had an adverse effect on his ability to carry out normal day to day activities: the claimant's mood was very low; he lacked motivation and was increasingly irritable; he was unable to face work and was certified as unfit to work by his GP; he was unable to socialise or spend time with his children; he had difficulty sleeping and he could not get out of bed in the morning; he had developed a stutter. He has taken a high dose of fluoxetine continuously since then, of between 40mg and 60mg daily. He continues to do so. He has been unable to reduce the dose any further than 40mg without becoming extremely agitated and more anxious. The Tribunal accordingly concluded that the adverse effects of the claimant's anxiety on his ability to carry out day to day activities, were he not taking fluoxetine, would have been continuous in the period from April 2014 to December 2020. The Tribunal was satisfied that the adverse effects on the claimant's ability to carry out day to day activities in that period were substantial. They were not minor or trivial.
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35. Finally, the Tribunal considered whether the substantial adverse effect was long term. By December 2020, the claimant had been suffering from these substantial adverse effects on his ability to carry out day to day activities since at least 2014. In addition, as at 24 January 2020, the claimant's GP assessed that these substantial adverse effects would last for the rest of the claimant's life. The substantial adverse effects of the mental impairment were accordingly, at the relevant time, long-term.
36. For the avoidance of doubt, given the continuous nature of the claimant's condition and the future prognosis, the Tribunal did not accept the respondent's assertion that this was simply the medicalisation of isolated work-related issues.
37. In light of the above, the Tribunal concluded that the claimant has demonstrated that he was a disabled person, for the purposes of s6(1) EqA, at the relevant time.

Knowledge of disability

38. The Tribunal found that the respondent did not have actual knowledge that the claimant was a disabled person during his employment. They knew that the claimant had anxiety, was taking fluoxetine and felt that he could not undertake nightshift work, but did not have any actual knowledge of the effects of the impairment. His condition was well managed by medication and, as noted by the claimant's GP in the report of 24 January 2020, *'the signs of his anxiety would not necessarily be obvious to an employer, whilst things were stable at work'*.
39. The respondent was however aware, from 20 October 2020, as a result of the forms they requested that the claimant complete on the commencement of his employment, that the claimant was taking fluoxetine and that this was because of anxiety. From 12 November 2020 they were also aware that the claimant considered that he had a mental health disability which prevented him working nightshifts. The claimant requested a free health assessment, as offered by the respondent in the form they passed to him in relation to working

at night. The respondent did not arrange for the claimant to attend a medical assessment. They made no enquiries of the claimant in relation to his stated condition of anxiety, the medication he indicated he was taking because of this or the fact that he stated to them that his medical condition prevented him working at night. The Tribunal concluded that the respondent did not do all they could reasonably be expected to do, to find out if the claimant had a disability. The respondent ought to have made further enquiries of the claimant in relation to his medical condition, given the information in their possession.

40. Had they made those enquiries, the respondent would have ascertained that the claimant had anxiety, and had been taking medication as a result of that condition, since at least 2014. The respondent would have ascertained the impact on the claimant's day to day activities, were he not taking medication. The claimant could have provided them with the report from his GP dated 24 January 2020, which was in his possession at that time and described the adverse impact his condition had on his ability to undertake day to day activities, were he not taking medication. Had the respondent done all it could reasonably have been expected to do to find out whether the claimant had a disability, they would have been readily able to ascertain this.

41. The Tribunal accordingly concluded that whilst the respondent did not have actual knowledge that the claimant was a disabled person at the relevant time, the respondent ought to have known, from at least 12 November 2020, that the claimant was a disabled person.

Employment Judge: Mel Sangster
Date of Judgment: 10 November 2021
Entered in register: 15 November 2021
and copied to parties